

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION**  
**OF SOUTH CAROLINA**  
**DOCKET NO. 2014-346-WS**

IN RE:	)	
Application of Daufuskie Island Utility	)	<b>MOTION TO STRIKE THE AFFIDAVIT OF JOHN F. GUASTELLA</b>
Company, Incorporated for Approval of an	)	
Increase for Water and Sewer Rates, Terms and	)	
Conditions	)	

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Pursuant to S.C. Code Ann. Regs. §§ 103-829, -845, -846, and -849, Rule 702 of the South Carolina Rules of Evidence, and the South Carolina Administrative Procedures Act (“APA”), the South Carolina Office of Regulatory Staff (“ORS”), by and through counsel, hereby moves that the Public Service Commission of South Carolina (“Commission”) issue an order striking the affidavit of John F. Guastella and Exhibit B, Remediation/Reparation Schedule (May 17, 2021) from the brief filed by Daufuskie Island Utility Company, Inc. (“DIUC”) on May 17, 2021.<sup>1</sup>

**Introduction and Background**

On March 30, 2021, the Commission issued Order No. 2021-132 (the “Order”), which approved the Settlement Agreement entered into between DIUC, Haig Point Club and Community Association, Inc., Melrose Property Owner’s Association, Inc., Bloody Point Property Owner’s Association (collectively referred to herein as the “POAs”), and ORS (referred to herein as the “Parties”). The Settlement Agreement makes it clear that the Parties have divergent viewpoints on whether DIUC has the ability to recover funds from its customers on a retroactive basis. Regarding this issue, the Order states, “the Parties can brief the matter to the Commission for its

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<sup>1</sup> See Exhibit A to DIUC brief-Affidavit of John F. Guastella.

further determination in this case.” On May 17, 2021, DIUC filed its brief in support of DIUC’s request for reparations.<sup>2</sup> As an attachment to its brief, DIUC included an affidavit of John F. Guastella and Exhibit B, a remediation/reparation schedule. The inclusion of the affidavit and schedule and potential reliance thereon by the Commission is improper, and ORS accordingly raises this objection and moves to strike the affidavit and exhibit B from the brief and consideration.

### **Support for Motion and Conclusion**

Pursuant to S.C. Code Ann. Reg. § 103-846, the South Carolina Rules of Evidence shall be followed in proceedings before the Commission. According to Rule 702 of the South Carolina Rules of Evidence expert opinion testimony is allowed “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,” when the witness is “qualified as an expert by knowledge, skill, experience, training, or education.” However, “[e]xpert testimony on issues of law is inadmissible” in South Carolina. Dawkins v. Fields, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003). The Supreme Court of South Carolina has held that expert opinions on legal arguments are not designed to assist the trier of fact understand facts and fall outside the scope of South Carolina Rule of Evidence 702. See, e.g., Green v. State, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002) (excluding expert testimony because it was not designed to assist the court’s understanding of certain facts, but, rather, was legal argument as to why the court should rule, as a matter of law, on the legal question before it); Kirkland v. Peoples Gas Co., 269 S.C. 431, 434, 237 S.E.2d 772, 773 (1977) (affirming the circuit court’s exclusion of expert testimony interpreting Department of Transportation Regulations that “constituted conclusions of law reserved to the province of the court”).

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<sup>2</sup> On April 21, 2021, the Commission issued Order No. 2021-271, which set a procedural schedule dictating the dates on which the parties’ briefs are due.

The same problems exist with Mr. Guastella's affidavit. While generically rendering legal opinions on a number of matters, Mr. Guastella's affidavit specifically discusses "the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 3 and 13 of the South Carolina Constitution."<sup>3</sup> Mr. Guastella failed to establish any qualifications to render legal opinions or make a legal determination. Even so, the determination of how these legal standards should be applied in this proceeding lies solely within the province of the Commission and DIUC's attempt to interject Mr. Guastella's unqualified legal opinion in this matter is impermissible. Accordingly, allowing Mr. Guastella to provide this legal opinion would violate the South Carolina Rules of Evidence and well-established Supreme Court precedent and would constitute reversible error if considered by the Commission. As a result, Mr. Guastella's affidavit should be struck from Commission consideration.

Moreover, while the Parties agreed that the legal issue of DIUC retroactively seeking reparations would be resolved via written submissions,<sup>4</sup> DIUC's attempt to use Mr. Guastella's affidavit in this regard is improper. Not only did DIUC previously state that "the record is fully developed and another hearing for further testimony or evidence is not necessary,"<sup>5</sup> but this affidavit and Exhibit B attempt to raise facts for consideration in the context of a legal brief and introduce new facts into the record for the Commission's consideration outside of a contested case hearing.<sup>6</sup> According to the APA, in a contested proceeding, any information offered for inclusion into the record must be subject to objection and cross-examination and otherwise comply with the rules of evidence. See S.C. Code Ann. § 1-23-330 (stating that, regarding "[e]videntiary matters

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<sup>3</sup> See DIUC Brief, p. 17; Exhibit A, paragraphs 12, 13, and 15.

<sup>4</sup> See Settlement Agreement paragraph 8(a).

<sup>5</sup> See letter filed by DIUC with this Commission on November 15, 2019.

<sup>6</sup> See DIUC Brief, Exhibit A, paragraphs 14, 16, 17, 18, 19, 20, 21, and Exhibit B, Remediation/Reparation Schedule.

in contested cases,” “[a]ny party may conduct cross-examination.”). Commission regulations also require that assertions of fact be introduced in pre-filed testimony in accordance with S.C. Code Regs. Ann. § 103-845. By including Mr. Guastella’s affidavit and Exhibit B, with the brief, neither the Commissioners nor ORS are afforded the opportunity to examine Mr. Guastella about this affidavit or the schedule. As a result, the inclusion of Mr. Guastella’s affidavit and Exhibit B in DIUC’s brief circumvents the statutory requirements and regulatory framework adopted by this Commission and would render meaningless the protections afforded to ORS by the APA.

In sum, Mr. Guastella’s affidavit and Exhibit B go beyond the proper boundaries of this brief regarding the legal merit of reparations, are clearly improper for Commission consideration, and should be struck. Accordingly, ORS respectfully moves that the Commission issue an order striking the affidavit of John F. Guastella and Exhibit B from the brief filed by DIUC on May 17, 2021, and make its decision based upon the legal arguments presented by the parties and the record as it currently stands.

Respectfully submitted,

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